STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2013
v	No. 309504 Muskegon Circuit Court
DONALD MARTIN ZUDER, Defendant-Appellant.	LC No. 11-060509-FH

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(e) (armed with a weapon). The trial court sentenced defendant to 3 1/2 to 15 years' imprisonment. Because we conclude that the record does not support defendant's claimed *Brady*[1] violation and that there were no errors regarding the instruction of the jury, we affirm.

The incident that led to defendant's arrest and conviction occurred in the summer of 2006. Defendant asked the victim, a longtime acquaintance, if she would be interested in performing some house cleaning duties for him to earn extra income. The victim accepted defendant's offer and defendant gave the victim a tour of his residence. After the tour was completed, defendant asked the victim if she would like "a drink." The victim agreed and sat at the kitchen counter while defendant fixed them both a drink.

After a while, defendant disappeared into another portion of his residence and returned with what the victim described as a "long" gun with a "black object on the top of it." Defendant stood in front of a long section of windows near the front of his residence, about 20 to 25 feet away from the victim, and pointed the gun out the window. Defendant commented that he could kill a deer on his property from where he stood. Defendant then turned and pointed the gun at the victim. Defendant told the victim that she was going to "start being a little more nicer [sic]" to him. Defendant said that he could not understand why she was "being such a tease." The victim requested that defendant take her home. Defendant denied the victim's request, and the

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

victim informed him that if he would not drive her home, she would walk. Defendant told the victim that, if she walked, he "would take [her] down" before she could reach the edge of the driveway. Defendant placed the gun on the kitchen table and retrieved a plastic bag full of women's undergarments. Defendant stood in front of the victim, who was still seated at the kitchen counter, and said that he wanted her to "show him [her] vagina." Defendant also asked to see the victim's "tits." The victim again asked defendant to take her home, but defendant refused.

The victim assumed, according to defendant's requests, that he wanted her to put on the undergarments in the plastic bag. The victim took off her clothes and put on the undergarments from the plastic bag. Defendant watched her as she undressed and dressed. Defendant then "put his hands all over" the victim's body. He touched both of her breasts under the brassier and put his hands down the front of her underwear. The victim testified that she was afraid of the gun, which was still on the table at this time and accessible to defendant, and that is why she complied with defendant's requests. Defendant then wanted to play a game of pool with the victim, who testified that she complied because she felt as though she had no choice. The victim played a game of pool with defendant, then she put her clothes back on and again requested that defendant take her home. This time defendant complied with her request and drove her home. The 2006 incident was eventually reported to police when defendant assaulted the victim again in 2009. The jury convicted defendant as previously stated.

On appeal, defendant first argues that his due process rights were violated when the prosecutor failed to divulge information subject to disclosure under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Defendant alleges that the prosecutor should have informed him that the two detectives involved in investigating the sexual assault committed ethics violations during their employment with the Norton Shores Police Department. These alleged violations included one officer sending the other officer's wife inappropriate text messages on a Department issued cellular telephone. Ultimately, according to defendant, one of the officers was fired over these ethics violations. Defendant argues that this information was material because it could have been used to impeach the officers' credibility during trial.

Defendant's argument is devoid of any evidence supporting his allegations. According to MCR 7.210(A), "[a]ppeals to the Court of Appeals are heard on the original record." "In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." MCR 7.210(A)(1). Defendant references several documents in his brief, but these are not found in the lower court record, nor has defendant moved this Court to expand the record on appeal under MCR 7.216(A)(4). Accordingly, it is "impermissible to expand the record on appeal." *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Moreover, the defendant bears the burden of "furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated," *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000), and has failed to do so here. We decline to further address the alleged *Brady* violation.

Next, defendant asserts that the trial court's jury instruction with regard to the "armed with a weapon" element of CSC II, MCL 750.520c(1)(e), was error. During trial, defendant objected to the jury instruction on the ground that it went "beyond the standard instruction."

However, on appeal, defendant appears to concede that "nonstandard instructions may be given," *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). Instead, he challenges the instruction on the ground that it misstated the law and was argumentative. This issue is not preserved. *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Generally, claims of instructional error are reviewed de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). However, "[w]ith regard to unpreserved claims of instructional error, this Court reviews such claims for plain error that affected substantial rights." *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). This issue also involves the "interpretation of a statute, the application of which is a question of law that we review de novo." *People v Sartor*, 235 Mich App 614, 618-619; 599 NW2d 532 (1999).

In order to determine whether an error requiring reversal exists, jury instructions are reviewed by this Court "in their entirety." *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). "Jury instructions must be read as a whole rather than extracted piecemeal to establish error." *Id.* "The instructions must include all the elements of the charged offense and must not omit material issues, defenses, and theories if the evidence supports them." *Bartlett*, 231 Mich App at 143. "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id.* at 143-144 (citations omitted). Therefore, it must be determined whether, read as a whole, the instructions fairly presented to the jury the "armed with a weapon" element of CSC II under MCL 750.520c(1)(e). *Piper*, 223 Mich App at 648; *Bartlett*, 231 Mich App at 143.

The phrase "armed with a weapon" is not defined by the statute. However, this phrase has been previously interpreted in the context of CSC crimes. In *People v Flanagan*, 129 Mich App 786, 797-798; 342 NW2d 609 (1983), when discussing first-degree criminal sexual conduct (CSC I), we determined that "armed with a weapon" may mean constructive as well as actual possession. Constructive possession, in the context of CSC I, has been defined as proximity to the weapon together with indicia of control. *People v Davis*, 101 Mich App 198, 202; 300 NW2d 497 (1980). Further, we have upheld convictions of CSC I where the victim disarmed the defendant before penetration. *People v Proveaux*, 157 Mich App 357, 362; 403 NW2d 135 (1987). The statutory language regarding whether defendant is "armed with a weapon" in MCL 750.520b(1)(e), the CSC I statute, is identical to the language of MCL 750.520c(1)(e), the CSC II statute at issue in this case. As such, constructive possession is properly considered with respect to the "armed with a weapon" for purposes of CSC II.

When instructing the jury on the "armed with a weapon" element, which is disputed, the trial court stated:

> Third, that the Defendant was armed at the time with a weapon. Armed with a weapon means that either, one, the Defendant had actual physical control of the weapon as I do the pen I am now holding (indicating); or a weapon which had been used to threaten [the victim] was readily available to the Defendant during the alleged sexual assault.

The trial court instructed the jury on the definition of actual possession, by using the phrase "actual physical control," and constructive possession, by using the phrase "readily available," within the context of "armed with a weapon" under the CSC II statute, MCL

750.520c(1)(e). The language "readily available" sufficiently conveyed the definition of constructive possession, which is defined as proximity to the weapon together with indicia of control. *Davis*, 101 Mich App at 202. Thus, we conclude that the jury instruction was not a misstatement of the law.

With regard to defendant's assertion that the instructions were argumentative or conclusory, defendant has abandoned the issue by his failure to cite any law in support of his position. *People v DiVietri*, 206 Mich App 61, 65; 520 NW2d 643 (1994). Nevertheless, we find that the instructions were not argumentative or conclusory, particularly when considered with the instructions: "To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt." Moreover, the trial court instructed the jury regarding how to consider whether the victim consented, which included consideration of whether defendant displayed a weapon.

Looking at the instructions "in their entirety," *Piper*, 223 Mich App at 648, the jury was properly instructed on its role and the correct evidentiary burden. Accordingly, we conclude that the trial court's jury instruction was not erroneous because it fairly presented the issues to be tried and sufficiently protected defendant's rights.

Finally, defendant argues that he was entitled to an instruction on CSC IV, MCL 750.520e(1)(b) (force or coercion), as a lesser included offense of CSC II, MCL 750.520c(1)(e) (armed with a weapon). We disagree. "This Court reviews de novo questions of law arising from jury instructions." *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009) (citation omitted).

MCL 768.32(1) "permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). "A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense." *Id.* However, the Michigan Supreme Court has also ruled that "it is not error to omit an instruction on such lesser offenses, where the evidence tends to prove only the greater." *People v Cornell*, 466 Mich 335, 355-356; 646 NW2d 127 (2002) (citation omitted). As such, "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

Here, it is unnecessary for us to determine whether CSC IV is a lesser included offense of CSC II under the elements as charged because, assuming that it is, "a rational view of the evidence" in this case does not support the lesser included instruction. *Id.* Surveying the entire record, there is no evidence that defendant applied any force or coercion to the victim except for his use of the weapon to effectuate the CSC and his proximity to the weapon during the CSC. Thus, we conclude that a rational view of the evidence did not support an instruction on CSC IV, MCL 750.520e(1)(b) (force or coercion), but tended to prove only a violation of MCL 750.520c(1)(e). Accordingly, the trial court did not err by refusing to give the requested CSC IV instruction.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra